

The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

v.

JOSEPH SAM,  
a/k/a WILLIAM EARLYSTAR CLARK,

Defendant.

NO. CR19-115-JCC

GOVERNMENT'S TRIAL BRIEF

The United States of America, by and through Tessa M. Gorman, Acting United States Attorney for the Western District of Washington, and Rebecca S. Cohen and Cecelia Gregson, Assistant United States Attorneys for said District, hereby files the Government's Trial Brief for the jury trial in the above-entitled matter scheduled to begin on June 7, 2021, before this Court.

I. INTRODUCTION

Defendant Joseph Sam a/k/a William Earlystar Clark is charged in a three-count Indictment with (1) Conspiracy to Commit Robbery, in violation of Title 18, United States Code, Section 371; (2) Robbery, in violation of Title 18, United States Code, Sections 2, 1153 and 2111; and (3) Assault Resulting in Serious Bodily, in violation of Title 18, United States Code, Sections 113(a)(6) and 1153.

1 Trial is set to commence on June 7, 2021. The government will be represented by  
 2 Assistant United States Attorneys Rebecca S. Cohen and Cecelia Gregson. The  
 3 defendant will be represented by Stephan Illa.

## 4 II. TRIAL MATTERS

### 5 A. *Estimated Length of Trial.*

6 The government anticipates needing approximately four to five days to present its  
 7 case in chief.

### 8 B. *Government Witnesses.*

9 The government intends to call approximately 25-35 witnesses to testify in its case  
 10 in chief at trial. The total number of witnesses will vary based in part on the Court's  
 11 rulings on its motions *in limine* and its motion regarding land status.

### 12 C. *Government Exhibits.*

13 The government has identified its proposed trial exhibits in a separately filed  
 14 exhibit list. The government's proposed exhibits consist of physical evidence (a cell  
 15 phone), documents (e.g., tribal enrollment records, medical records, etc.), photographs,  
 16 video recordings, and audio recordings.

### 17 D. *Stipulations.*

18 The government attempted to enter into stipulations regarding Indian status, land  
 19 status, and the admissibility of business records through Rule 902 certifications. Because  
 20 defendant was unwilling to enter into stipulations on these matters, the government has  
 21 filed motions on the certification of business records and land status, and will call a  
 22 witness to testify at trial regarding Indian status. In the event the Court denies the  
 23 pending motions, the government is prepared to call a witness to testify at trial regarding  
 24 land status, as well as a number of records custodians to authenticate business records.

### 25 E. *Jury Selection.*

26 The government understand that jury selection will occur solely in-person and not  
 27 by remote means. The government concurs with this approach and respectfully submits  
 28 that due to the Court's restrictions on the number of people allowed in the courtroom at

1 one time, the prospective panel should be split into two groups with a separate *voir dire*  
2 conducted for each group. As previously conveyed to the Court, the government objects  
3 to asking prospective jurors about their COVID-19 vaccination status, both because it  
4 could prevent the parties from selecting a panel of individuals who represent a fair cross-  
5 section of the community, and because it might serve to create divisiveness amongst the  
6 prospective jurors.

### 7 III. FACTUAL BACKGROUND

8 The government will seek to introduce the following evidence at trial.

9 On or about February 6, 2019, unindicted co-conspirator Mariah Boudrieau  
10 conspired with defendant Joseph Sam a/k/a William Earlystar Clark and co-defendant  
11 Dennis Peltier to rob John Doe of approximately one ounce of heroin. The plan devised  
12 by Boudrieau was to tell her ex-boyfriend, John Doe, that she had a buyer who wanted to  
13 purchase an ounce of heroin and to arrange for the buy. When Doe showed up, however,  
14 the co-conspirators would rob Doe of the heroin. Boudrieau recruited Peltier to pose as  
15 the purported buyer of the heroin and had Doe come to Peltier's residence with the heroin  
16 believing that he would sell the heroin to Peltier.

17 Around 11:30 p.m. on February 6, 2019, John Doe arrived at Peltier's residence  
18 with an ounce of heroin. He was accompanied by a friend, J.G., who waited in the car  
19 while Doe went inside. Once inside, Doe spoke to Peltier and Boudrieau and showed  
20 them the heroin. Peltier then went into the kitchen, pretending to look for \$1200 in cash,  
21 which was the cost of the heroin. While Doe waited for Peltier to return from the  
22 kitchen, a third co-conspirator entered the residence, leading his way through the door  
23 with a handgun. When Doe spotted the gun he threw his body into the front door,  
24 smacking the individual's arm between the door and the door jamb. This caused  
25 Boudrieau to attack Doe in an attempt to help facilitate the robbery. While Doe and  
26 Boudrieau were engaged in a scuffle, the third co-conspirator shot Doe in the back and  
27 Doe dropped to the ground. While he was on the ground, Boudrieau went through Doe's  
28

1 pockets and took cash and his phone. The shooter and Boudrieau then left the residence  
2 with the cash, Doe's phone, and the heroin.

3 J.G. called 911 before leaving the area and law enforcement arrived on scene.  
4 Doe gave a number of statements to officers from the Tulalip Police Department (TPD),  
5 both to first responders on scene and at the hospital over the next few days. Although  
6 Doe could not identify the shooter because his face was covered, Doe did provide the  
7 name "Dennis" as the person who posed as the buyer, and Doe repeatedly named  
8 Boudrieau as the person who set up the robbery and took the cash and phone from his  
9 wallet after the shooting. Doe described the shooter as a Native American male, either  
10 about his height or slightly taller, wearing silver rings, with tattoos on his fingers and  
11 hands.

12 After the robbery and shooting, TPD obtained a warrant for Peltier's home, and  
13 evidence found in the residence, along with information obtained from interviews, led  
14 TPD to identify and arrest Peltier and Boudrieau within days. After his arrest, Peltier told  
15 TPD that although he did not know the shooter's name, Boudrieau had referred to him as  
16 "Strap," and that it was Boudrieau who had originally come up with the plan for the  
17 robbery.

18 In an attempt to identify the shooter, TPD conducted research on Facebook and  
19 identified a Facebook user who was friends on Facebook with both Peltier and Boudrieau  
20 – a user with the Facebook name "StreezyNW" and a nickname of "Strap." The  
21 "StreezyNW" account had pictures of an adult male that TPD was able to identify as  
22 Joseph E. Sam, in part through tattoos depicted in the pictures.

23 On March 20, 2019, United States Magistrate Judge Mary Alice Theiler issued a  
24 search warrant for information in the Facebook accounts of Peltier and Boudrieau. Upon  
25 review, the records returned by Facebook revealed communications between the account  
26 associated with Boudrieau and the "StreezyNW" account, including communications  
27 where Boudrieau referred to the user of the "Streezy NW" account as "Strap."

28 Additionally, Facebook conversations between Boudrieau and the "Streezy NW" account

1 discussed narcotics trafficking and on February 6, 2019, Boudrieau asked “Streezy NW”  
2 to help her with a robbery. The communications also confirm that in the days after the  
3 robbery of John Doe, Boudrieau was frantically trying to get in touch with “Streezy  
4 NW,” and that Boudrieau had tried to recruit a fourth individual – Facebook user  
5 “Captian Kachuckles,” to help with the robbery. Interviews with additional witnesses led  
6 TPD to further corroborate the identity of the person using the “StreezyNW” Facebook  
7 account as Joseph E. Sam and to confirm that Sam was the shooter.

8 On May 15, 2019, Sam was arrested on an arrest warrant issued by the Tulalip  
9 Tribal Court and the arresting officers seized a cell phone located on his person. Officers  
10 transported Sam back to TPD, where he was interviewed after waiving his *Miranda*  
11 rights. During the interview, Sam denied involvement in the robbery or the assault and  
12 claimed he was in Bellingham at the time. Sam stated that he previously had been  
13 questioned by a Tulalip gaming official, who mistakenly identified him. Sam further  
14 stated that the gaming official had been looking for another man who looked identical to  
15 him except for a scar. Sam asserted that this other individual was likely the one involved  
16 in the robbery and assault. When questioned about the “StreezyNW” Facebook account,  
17 Sam denied that the account was his. He stated that someone else must have created the  
18 account and posted that information, pretending to be him, possibly trying to implicate  
19 him in the crimes.

20 Numerous friends and acquaintances of Sam have since confirmed Facebook  
21 communications and conversations with Sam in which Sam admitted to being involved in  
22 the robbery and shooting of John Doe. Internet protocol addresses further corroborate  
23 that the cell phone seized from Sam’s person at the time of his arrest was used on  
24 countless occasions to login to the “StreezyNW” account and a second account (user  
25 name “Smithn Wesson”) attributable to Sam during relevant periods of time following  
26 the shooting.

#### 27 IV. APPLICABLE LAW – ELEMENTS AND DEFINITIONS

28

1 In order for the defendant to be found guilty of the crime of Conspiracy to Commit  
 2 Robbery, in violation of Title 18, United States Code, Section 371, as charged in Count 1,  
 3 the government must prove each of the following three elements beyond a reasonable  
 4 doubt: *First*, on or about February 6, 2019, there was an agreement between two or more  
 5 persons to commit robbery; *Second*, the defendant became a member of the conspiracy  
 6 knowing of at least one of its objects and intending to help accomplish it; and  
 7 *Third*, at least one of the members of the conspiracy performed at least one overt act for  
 8 the purpose of carrying out the conspiracy. *See* Ninth Circuit Model Jury Instruction –  
 9 8.20 (2010 Edition – Approved 1/2019).

10 In order for the defendant to be found guilty of the crime of Robbery, in violation  
 11 of Title 18, United States Code, Sections 2, 1153, and 2111, as charged in Count 2, the  
 12 government must prove each of the following three elements beyond a reasonable doubt:  
 13 *First*, the defendant knowingly obtained money or property from or in the presence of  
 14 John Doe; *Second*, the defendant did so by means of robbery; *Third*, the defendant  
 15 believed that John Doe, parted with the money or property because of the robbery;  
 16 *Fourth*, the offense occurred within Indian Country; and *Fifth*, the defendant is an Indian.  
 17 *See* Ninth Circuit Model Jury Instruction – 8.143A (2010 Edition – Approved 3/2021);  
 18 Comment to Ninth Circuit Model Jury Instruction – 8.113 (2010 Edition – Approved  
 19 6/2019). The defendant may be found guilty of Robbery even if he personally did not  
 20 commit the act or acts constituting the crime but aided and abetted in its commission.  
 21 *United States v. Goldtooth*, 754 F.3d 763 (9th Cir. 2014).

22 In order for the defendant to be found guilty of the crime of Assault Resulting in  
 23 Serious Bodily Injury, in violation of Title 18, United States Code, Sections 113(a)(6)  
 24 and 1153, as charged in Count 3, the government must prove each of the following three  
 25 elements beyond a reasonable doubt: *First*, the defendant assaulted John Doe by  
 26 intentionally striking or wounding him; *Second*, as a result, John Doe suffered serious  
 27 bodily injury; *Third*, the defendant is an Indian; and *Fourth*, the assault occurred within  
 28 Indian Country. “Serious bodily injury” means bodily injury that involves (1) a

substantial risk of death; (2) extreme physical pain; (3) protracted and obvious disfigurement; or (4) protracted loss or impairment of the function of a body part, organ, or mental faculty. *See* Ninth Circuit Model Jury Instruction – 8.9 (2010 Edition); Comment to Ninth Circuit Model Jury Instruction – 8.113 (2010 Edition – Approved 6/2019).

## V. LEGAL AND EVIDENTIARY ISSUES

### A. *Jurisdiction and Indian Status.*

The United States has jurisdiction, pursuant to Title 18, United States Code, Section 1153, over offenses under Title 18, United States Code, Section 113, when such offenses are committed by an Indian person within Indian Country, as defined by Section 1151 of Title 18, United States Code.<sup>1</sup>

A defendant is an “Indian” if he has (1) has some quantum of Indian blood and (2) is a member of, or is affiliated with, a federally recognized tribe. *United States v. Zepeda*, 792 F.3d 1103, 1113 (9<sup>th</sup> Cir. 2015). Indian status is a jurisdictional element for the jury to decide. *See United States v. Bruce*, 394 F.3d 1215, 1223-24 (9<sup>th</sup> Cir. 2005).

The jury will determine whether the government has met its burden of establishing the defendant’s Indian status based on the Ninth Circuit’s Model Criminal Jury Instruction No. 8.113 (Determination of Indian Status for Offenses Committed Within Indian Country), which provides as follows:

In order for the defendant to be found to be an Indian, the government must prove the following, beyond a reasonable doubt:

First, the defendant has some quantum of Indian blood, whether or not that blood is traceable to a member of a federally recognized tribe; and

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<sup>1</sup> As noted above, the government filed a motion asking the Court to find that the address where the government alleges the crimes took place is located on tribal trust land within the boundary of the Tulalip Reservation and is in Indian Country, and to instruct the jury of this finding. The question of whether the offenses occurred at this particular location is a question of fact to be decided by the jury. The defense has informed the Court that it does not oppose the government’s requested relief on this issue.



1 Second, the defendant was a member of, or affiliated with, a federally  
2 recognized tribe at the time of the offense.

3 Whether the defendant was a member of, or affiliated with, a federally  
4 recognized tribe is determined by considering four factors, in declining  
5 order of importance, as follows:

- 6 1. Enrollment in a federally recognized tribe;
- 7 2. Government recognition formally and informally through receipt  
8 of assistance reserved only to individuals who are members, or are  
9 eligible to become members, of federally recognized tribes;
- 10 3. Enjoyment of the benefits of affiliation with a federally  
11 recognized tribe; and
- 12 4. Social recognition as someone affiliated with a federally  
13 recognized tribe through residence on a reservation and participation  
14 in the social life of a federally recognized tribe.

14 Ninth Circuit Model Criminal Jury Instruction § 8113.

15 The government will ask that the Court instruct the jury that the Upper Skagit  
16 Tribe is a federally recognized tribe.<sup>2</sup>

17 In the present case, the government will establish the defendant's status at trial  
18 through the testimony of a member services officer of the Upper Skagit Tribe, who will  
19 testify that the defendant has been an enrolled member of the Upper Skagit Indian Tribe  
20 since 1979. The government will admit into evidence the defendant's Certificate of  
21 Tribal Enrollment, which shows that he was added to the rolls of the Upper Skagit Indian  
22 Tribe through a resolution passed on September 28, 1979, and that his total blood  
23  
24  
25

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26 <sup>2</sup> The Upper Skagit Indian Tribe is listed in the Federal Register by the United States Department of the Interior,  
27 Bureau of Indian Affairs (BIA) as a federally recognized tribe. *See, e.g.*, Indian Entities Recognized and Eligible to  
28 Receive Services from the United States Bureau of Indian Affairs ("BIA List"), 84 Fed. Reg. 1200 (February 1,  
2019). "Absent evidence of its incompleteness, the BIA list appears to be the best source to identify federally  
acknowledged Indian tribes whose members or affiliates satisfy the threshold criminal jurisdiction inquiry." *LaPier*  
*v. McCormick*, 986 F.2d 303, 305 (9<sup>th</sup> Cir. 1993).



1 quantum is 1/4. This evidence alone is sufficient to establish the defendant's status as an  
2 Indian.<sup>3</sup>

3 B. *Statements Under the Federal Rules of Evidence Pertaining to Hearsay.*

4 A statement is hearsay if it is (1) an assertion that (2) is made out of court and (3)  
5 is offered to prove the truth of the matter asserted. Fed. R. Evid. 801(c). Many court  
6 statements may be considered non-hearsay because they either are not assertions, or they  
7 are not offered to prove the truth of the matter asserted. *United States v. Oguns*, 921 F.2d  
8 442, 449 (2d Cir. 1990) (questions are not assertions and are thus not hearsay).

9 1. Excited Utterances, Rule 803(2).

10 An excited utterance is a "statement relating to a startling event or condition,  
11 made while the declarant was under the stress of excited that it caused." Fed. R. Evid.  
12 803(2). Two factors are considered; "[f]irst, there must be some occurrence or event  
13 sufficiently startling to render normal reflective thought processes inoperative. Second,  
14 the statement of the declarant must have been a spontaneous reaction to the occurrence or  
15 event and not the result of reflective thought." *United States v. McLennan*, 563 F.2d 943,  
16 948 (9<sup>th</sup> Cir. 1977) (quoting *McCormick on Evidence*, 2d Ed. p. 704). The lapse of time  
17 between the startling event and the out-of-court statement although relevant is not  
18 dispositive in the application of rule 803(2). *United States v. Rivera*, 43 F.3d 1291, 1296  
19 (9<sup>th</sup> Cir. 1995) (citing *United States v. Iron Shell*, 633 F.2d 77, 85 (8<sup>th</sup> Cir.1980)); *see also*  
20 Fed. R. Evid. 803 advisory committee's note. In *Rivera*, a 15-year-old child was raped in  
21 a truck by an individual who was driving her home. The victim reported the rape to her  
22 mother after the rape had occurred earlier that morning. *Id.* at 1296. The court affirmed  
23 the statements as admissible under the excited utterance exception, noting that "[r]ather  
24 than focusing solely on the time a statement was made, we consider other factors,

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27 <sup>3</sup> See, e.g., *United States v. Zepeda*, 792 F.3d 1103, 1115-16 (9<sup>th</sup> Cir. 2015) (enrollment certificate showing  
28 enrollment in a federally recognized tribe at the time of the offense and evidence of blood quantum was enough to  
satisfy the test for Indian status).

1 including the age of the declarant, the characteristics of the event and the subject matter  
2 of the statements . . . .” *Id.*

3 In this case, John Doe made excited utterances to the TPD officers who first  
4 arrived on scene when he described having just been shot in the back and robbed, and  
5 named Boudrieau as the person who set him up.

6 2. Statements Made by John Doe Regarding His Then-Existing Mental,  
7 Emotional, or Physical Condition, Rule 803(3).

8 Rule (803)(3) “excepts from the general exclusion of hearsay ‘statement[s] of the  
9 declarant’s then-existing state of mind (such as motive, intent, or plan) or emotional,  
10 sensory, or physical condition (such as mental feeling, pain, or bodily health), but not  
11 including a statement of memory or belief to prove the fact remembered or believed[.]’”  
12 *Wagner v. County of Maricopa*, 747 F.3d 1048, 1052 (9<sup>th</sup> Cir. 2013); Fed. R. Evid.  
13 803(3). Here, John Doe made numerous statements to law enforcement officers and  
14 medical providers about the physical symptoms and pain he was experiencing at the time  
15 the statements were made. For example, Doe told officers he couldn’t feel his legs and  
16 screamed out in pain. These are exactly the type of statements covered by Rule 803(3),  
17 as Doe was explaining his then-existing physical condition at the time each statement was  
18 made. *See, e.g., United States v. Iron Shell*, 633 F.2d 77, 83, n.9 (8<sup>th</sup> Cir. 1980) (finding  
19 that a statement made by the victim to her medical provider that she was experiencing  
20 pain in her vaginal area was an “expression of a present symptom [that] falls within the  
21 second category of 803(4) and would also be excepted from the hearsay rule under rule  
22 803(3) covering a then existing physical condition”).

23 3. Recorded Recollections, Rule 803(5).

24 When he testifies at trial, if John Doe (or any other witness) is unable to recall any  
25 of the events surrounding the robbery and shooting and/or what occurred immediately  
26 thereafter, the government will seek to play body cam recordings of his prior statements  
27  
28

as recorded recollections that are not excluded by the rule against hearsay.<sup>4</sup> Rule 803(5) permits such an admission, and applies to the following records/statements:

***Recorded Recollection.*** A record that:

- (A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;
- (B) was made or adopted by the witness when the matter was fresh in the witness's memory; and
- (C) accurately reflects the witness's knowledge.

Fed. R. Evid. 803(5).<sup>5</sup> The "hearsay exception for recorded recollection is generally recognized and has been described as having 'long been favored by the federal and practically all the state courts that have had occasion to decide the question.'" *Mordick v. Valenzuela*, 780 Fed. Appx. 430, 434 (9<sup>th</sup> Cir. June 27, 2019) (quoting Advisory Committee Note to Rule 803(5)).

#### 4. Prior Consistent Statements, Rule 801(d)(1)(B).

A witness's prior consistent statements are admissible for their truth, pursuant to Fed. R. Evid. 801(d)(1)(B)(ii), when necessary to rebut attacks on the witness's credibility. Rule 801(d)(1)(B) provides that statements satisfying the following conditions are not hearsay:

The declarant testifies and is subject to cross-examination about a prior statement, and the statement . . . is consistent with the declarant's testimony and is offered (i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or (ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground.

Fed. R. Evid. 801(d)(1)(B).

Prior to a 2014 amendment to Rule 801(d)(1)(B), only prior consistent statements offered to rebut charges of recent fabrication or improper motive were substantively

<sup>4</sup> In addition, some or part of the statements are also admissible under other hearsay exceptions discussed separately in this brief.

<sup>5</sup> The rule goes on to state that "[i]f admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party." *Id.*

admissible. However, with the addition of subpart (ii), consistent statements that rebut other attacks on a witness, for example, “charges of inconsistency or faulty memory” may be given substantive effect by the jury. *United States v. Wilkinson*, No. 1:14-CR-BLW-1, 2015 WL 6182466 at \*12 (D. Idaho Oct. 21 (2015) (*citing* Fed. R. Evid. 801 Ad. Comm. Notes).

##### 5. Statements of Co-Conspirators.

Facebook and text messages sent to and from the defendant, as well as electronic communications offered that are solely among other members of the conspiracy, are admissible as co-conspirator statements pursuant to Federal Rule of Evidence 801(d)(2)(E). Under Rule 801(d)(2)(E), a statement made by a co-conspirator is admissible if the government establishes by a preponderance of the evidence: (1) the existence of a conspiracy; (2) the defendant’s connection to it, and (3) that the statement was made during and in furtherance of the conspiracy. *Bourjailly v. United States*, 483 U.S. 171, 175 (1987); *United States v. Fleishman*, 684 F.2d 1329, 1337 (9th Cir. 1982). The statements themselves may help establish their admissibility and reliability under 801(d)(2)(E). *See Bourjailly*, 483 U.S. at 175; *see also United States v. Schmit*, 881 F.2d 608 (9th Cir. 1989). However, there must be some evidence, aside from the proffered statements, of the existence of the conspiracy and the defendant’s involvement. *United States v. Gordon*, 844 F.2d 1397, 1402 (9th Cir. 1988). Circumstantial evidence is sufficient. *See, e.g., United States v. Mason*, 658 F.2d 1263, 1269 (evidence that defendant visited coconspirator’s residence just prior to time coconspirator advised he had drugs was sufficient to connect defendant to the conspiracy).

To satisfy the “furtherance” requirement, the statement must be said to “‘further the common objectives of the conspiracy,’ or, ‘set in motion transactions that [are] an integral part of the [conspiracy].’” *United States v. Layton*, 720 F.2d 548, 555 (9th Cir. 1983). Examples of statements “in furtherance” of a conspiracy include statements that keep a conspirator abreast, *United States v. Andersson*, 813 F.2d 1450, 1456 (9th Cir. 1987); induce continued participation, *United States v. Eaglin*, 571 F.2d 1069, 1083 (9th

1 Cir. 1977); allay fears, *United States v. Layton*, 720 F.2d 548, 557 (9th Cir. 1983);  
 2 explain co-conspirators' roles, *United States v. Moody*, 778 F.2d 1380, 1382-83 (9th Cir.  
 3 1985), amended by 791 F.2d 707 (9th Cir. 1986); or aim to avoid detection, *United States*  
 4 *v. Sears*, 663 F.2d 896, 905 (9th Cir. 1981). The focus is on the declarant's intent in  
 5 making the statement, not on its actual effect of promoting the goals of the conspiracy.  
 6 *United States v. Zavala Serra*, 853 F.2d at 1516; *United States v. Layton*, 720 F.2d 548,  
 7 557 n.5 (9th Cir. 1983).

8 Additionally, it is not necessary that the statement be made to another member of  
 9 the conspiracy for it to come under Rule 801(d)(2)(E). *See Zavala Serra*, 853 F.2d at  
 10 1516 (statements to government informant); *United States v. Taylor*, 802 F.2d 1108, 1117  
 11 (9th Cir. 1986) (statements to undercover FBI agent); *United States v. Echeverry*, 759  
 12 F.2d 1451, 1457 (9th Cir. 1985) (statements to undercover DEA agent); *United States v.*  
 13 *Smith*, 623 F.2d 627, 631 (9th Cir. 1980) (statement to informant).

14 The order of proof is left to the discretion of the Court such that a co-conspirator's  
 15 statements may be admitted subject to being struck for failure of independent proof of the  
 16 existence of the conspiracy and the defendant's connection to it. *United States v. Perez*,  
 17 658 F.2d 654, 658 59 (9th Cir. 1981).

18 Finally, the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36, 56  
 19 (2004), has no effect on the admissibility of statements by co-conspirators in furtherance  
 20 of a conspiracy. Specifically, the Supreme Court found that the statements of co-  
 21 conspirators are not made with the expectation that they will be used at trial, and  
 22 therefore there is no Sixth Amendment violation by an inability of the defendant to cross  
 23 examine the coconspirators who made the statements. *Id.*; *see also United States v.*  
 24 *Larson*, 460 F.3d 1200, 1213 (9th Cir. 2006) (Ninth Circuit recognizing that the  
 25 admission of co-conspirator statements do not violate the Sixth Amendment).<sup>6</sup>

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26  
 27 <sup>6</sup> Co-conspirator Boudrieau was charged in Snohomish County Superior Court for her role in the robbery and  
 28 assault. She was convicted after a jury trial in July 2020 and has an appeal pending with Division I of the  
 Washington State Court of Appeals. The government intends to call Boudrieau to testify at trial. A hearing will  
 Government's Trial Brief

1                   6.     Statements by Other Individuals in Electronic Communications Are  
 2                   Not Hearsay.

3                   Some of the evidence in this case will consist of electronic communications  
 4 between defendant and other individuals in Facebook messages and other messages to or  
 5 from Peltier and/or Boudrieau in furtherance of the conspiracy. Defendant's statements  
 6 are admissible as statements of a party opponent pursuant to Rule 801(d)(2)(A). And as  
 7 discussed above, statements of co-conspirators made in furtherance of the conspiracy are  
 8 admissible as well.

9                   The statements of the other speakers in these communications are admissible for a  
 10 variety of non-hearsay purposes, rather than for the truth of the matters asserted by those  
 11 speakers. Generally, the statements by other speakers are offered to put defendant's or  
 12 the co-conspirators statements in context. *See United States v. Whitman*, 771 F.2d 1348,  
 13 1352 (9th Cir. 1985); *United States v. Tolliver*, 454 F.3d 660, 666 (7th Cir. 2007)  
 14 ("Statements providing context for other admissible statements are not hearsay because  
 15 they are not offered for their truth"); *United States v. Barone*, 913 F.2d 46, 49 (2d Cir.  
 16 1990) (the district court properly admitted evidence of an informant's recorded  
 17 statements during a conversation with the defendant where they were presented not for  
 18 the truth of the matter asserted, but to establish a context to assist the jury in  
 19 understanding the recorded statements of the defendant, i.e., his admissions); *see also*  
 20 *United States v. Davis*, 890 F.2d 1373, 1380 (7th Cir. 1989) (when a defendant has an  
 21 out-of-court recorded conversation with a third party, and the defendant's statements are  
 22 admissible as party admissions, the third party's statements to the defendant during the  
 23 recorded conversation are admissible "as reciprocal and integrated utterances between  
 24 two parties for the limited purpose of putting the response of the defendant in context of  
 25 making them intelligible to the jury and recognizable as admissions").

26                   7.     J.G.'s Statements Against Interest.

27 \_\_\_\_\_  
 28 need to be conducted outside the presence of the jury to determine if she intends to invoke her Fifth Amendment  
 right to silence in light of the actively pending appeal.

Government's Trial Brief

*United States v. Joseph Sam*, CR19-115-JCC - 14

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Pursuant to Rule 804(b)(3), a statement made against the declarant's penal interest is admissible as an exception to the hearsay rule if the declarant is unavailable to testify at trial due to death, in cases where the statement is "supported by corroborating circumstances that clearly indicate its trustworthiness." Fed. R. Evid. 804(b)(3). Here, John Doe's friend J.G. made numerous statements to law enforcement in the days following the robbery and assault. These statements were contrary to J.G.'s penal interests and are corroborated by information provided by Doe and Peltier. J.G. admitted that on February 6, 2019, he provided heroin to Doe with the belief that Doe would sell it to Peltier. J.G. also discussed how he accompanied Doe to Peltier's residence for the sale and described his interactions with Boudrieau at the scene. J.G. subsequently died in August of 2019. His prior statements made to law enforcement about what occurred on the night of the robbery and assault are admissible under Rule 804(b)(3).

C. *Other Evidentiary Issues.*

1. Witness Impeachment.

The defense should be required to provide notice if it intends to impeach witnesses called by the government with their criminal histories. Rule of Evidence 609 governs impeachment of witnesses based on criminal convictions. A party may impeach a witness (other than the defendant) with a conviction for a crime punishable by imprisonment in excess of one year (*i.e.*, felonies) if it satisfies Rule of Evidence 403. *See* Fed. R. Evid. 609(a)(1). A party may also impeach a witness with a conviction for any crime, regardless of the punishment (*i.e.*, misdemeanors), if the elements are such that the conviction necessarily evidences a dishonest act or false statement. *See* Fed. R. Evid. 609(a)(2). However, if over ten years has passed since the latter of the witness's conviction or release from custody, the conviction is admissible only if the probative value substantially outweighs the prejudice, and the proponent provides written notice to the adverse party. *See* Fed. R. Evid. 609(b). On May 21, 2021, the government provided complete criminal history reports for witnesses that the government anticipates calling during its case-in-chief. Pursuant to the rule, the government requests notice detailing the



1 information the defense intends to elicit concerning a witness's prior conviction subject  
2 to Rule of Evidence 609(b).

3 Rule 609 does not govern the use of prior arrests or warrants for purposes of  
4 impeachment. *See Medrano v. Los Angeles*, 973 F.2d 1499, 1507 (9th Cir. 1992).  
5 Instead, this issue is governed by Rule 608(b), which governs specific instances of  
6 misconduct by a witness. The district court may permit a party to inquire during cross-  
7 examination about specific instance of conduct relating to veracity or character for  
8 truthfulness or untruthfulness. *See Fed. R. Evid. 608(b)*.

9 To that end, the government produced law enforcement reports documenting  
10 witness interactions with law enforcement that could potentially qualify as a specific  
11 instances of misconduct relating to veracity. That said, an adverse party may not  
12 introduce extrinsic evidence to prove the witness' past conduct, including in  
13 circumstances in which the witness denies the conduct. *See id.* Several of the produced  
14 reports have limited probative value because they qualify as nothing more than an  
15 accusation of misconduct, which is generally outweighed by the accompanying prejudice.  
16 *See Michelson*, 335 U.S. at 482 ("Arrest without more does not, in law any more than in  
17 reason, impeach the integrity or impair the credibility of a witness."); *see also Barber v.*  
18 *City of Chi.*, 725 F.3d 702, 709 (7th Cir. 2013); *United States v. Weicks*, 362 F. App'x  
19 844, 849-50 (9th Cir. 2010). The government requests the defense provide notice in  
20 advance of cross-examination on a specific instance of conduct.

## 21 2. Body Camera Recordings.

22 The government expects to offer excerpts of body-worn video (BWV) recorded by  
23 the TPD officers who responded to the 911 call on February 6, 2019. These excerpts will  
24 depict the scene encountered by the officers upon their arrival and their initial encounter  
25 with John Doe. The government will establish the authenticity, accuracy, and  
26 trustworthiness of the video clips through the officers who wore the cameras. The  
27 statements made by John Doe in the video are admissible under exceptions to the hearsay  
28

rule discussed elsewhere in this Trial Brief (e.g., present sense impression, excited utterances, prior consistent statements).

### 3. Photographs and Diagrams.

The government expects to offer photographs and maps of various locations associated with the case, including the scene robbery and shooting. These exhibits are admissible if a witness testifies that they are accurate representations of what they are intended to depict. *United States v. Brannon*, 616 F.2d 413, 416 (9th Cir. 1980) (evidence that photographs accurately depict scene provides a sufficient foundation for admission under FRE 901(a)).

### 4. Charts and Summaries.

The government will seek to introduce exhibits summarizing information from records produced by Facebook, AT&T, Frontier, Text Now, and T-Mobile. The government intends to have FBI Special Agent Matthew McElhiney and TPD Detective Sergeant Wayne Schakel testify about the summary exhibits. The government may use some of its charts and summaries during opening statements, the presentation of its case in chief and/or during closing argument. These charts and summaries will substantially assist the jury in understanding the government's proof in this case.

It is well-established that a trial court in its discretion may allow the presentation of summary evidence to guide and assist the jury in understanding and judging the factual controversy. *See* Fed. R. Evid. 1006; *United State v. Skalicky*, 615 F.2d 1117, 1120-21 (5th Cir. 1980); *United States v. Cooper*, 464 F.2d 648, 656 (10th Cir. 1972). A foundation for the admission of each chart and summary will be laid through the testimony of various witnesses, who will testify that the charts and summaries accurately reflect information contained in documents already in or to be admitted into evidence. *See United States v. Lemire*, 720 F.2d 1327, 1349 (D.C. Cir. 1983); *United States v. Pollack*, 417 F.2d 240, 241 (5th Cir. 1969).

Because of the voluminous amount and nature of data evidence in this case, the government intends to rely on the testimony of Special Agent Mcelhiney and Detective

Sergeant Schakel to summarize and analyze the contents of the information retrieved from the various accounts which will be offered as evidence at trial. Federal Rule of Evidence 1006 provides that “the contents of voluminous writings, recordings or photographs which cannot be conveniently examined in Court may be presented in the form of a chart, summary, or calculation.” The Ninth Circuit has recognized that summary evidence “can help the Jury organize and evaluate evidence which is factually complex and fragmentally revealed in the testimony of the multitude of witnesses.” *United States v. Shirley*, 884 F.2d 1130, 1133 (9th Cir. 1989), quoting *United States v. Lemire*, 720 F.2d 1327, 1348 (D.C. 1983); *see also United States v. Meyers*, 847 F.2d 1408, 1412 (9th Cir. 1988) (approving the use of a summary chart where the sequence of events as confusing and the chart contributed to the clarity of the presentation).

Although the underlying materials upon which the summary testimony is based must be “admissible,” they need not be actually admitted into evidence. *United States v. Meyers*, 847 F.2d at 1412. The foundation for admission of such a summary is simply that the records are voluminous and that in-court examination would be inconvenient. *United States v. Duncan*, 919 F.2d 981, 988 (5th Cir. 1990).

Summary charts may also be used by the government in its opening statement. Indeed, “such charts are often employed in complex conspiracy cases to provide the Jury with an outline of what the government will attempt to prove.” *United States v. De Peri*, 778 F.2d 963, 979 (3d Cir. 1985) (approving government’s use of chart), *cert denied*, 475 U.S. 110 (1986); *United States v. Rubino*, 431 F.2d 284, 290 (6th Cir. 1970), *cert. denied* 401 U.S. 910 (1971) (same).

In addition, summary charts are admissible under Fed. R. Evid. 611(a), which permits a court to “exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for ascertainment of the truth; (2) avoid needless consumption of time; and (3) protect witnesses from harassment or undue embarrassment.” *United States v. Gardner*, 611 F.2d 770, 776 (9th Cir. 1980). A chart summarizing the unavailable document is

1 also admissible under Fed. R. Evid. 1004 if the underlying materials are “lost or  
2 destroyed” or “not obtainable.” Fed. R. Evid. 1004(1) and 1004(2).

3 A summary witness may also properly testify about, and use a chart to summarize,  
4 evidence that has already been admitted. The court and jury are entitled to have a witness  
5 “organize and evaluate evidence which is factually complex and fragmentally revealed.”  
6 *United States v. Shirley*, 884 F.2d 1130, 1133-34 (9th Cir. 1989) (agent’s testimony  
7 regarding her review of various telephone records, rental receipts, and other previously  
8 offered testimony held to be proper summary evidence as it helped the Jury organize and  
9 evaluate evidence; summary charts properly admitted); *United States v. Lemire*, 720 F.2d  
10 1327, 1348 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1266 (1984).

11 Finally, a summary witness may rely on the analysis of others where he or she has  
12 sufficient experience to judge another person’s work and incorporate as his own the facts  
13 of that individual’s expertise. The use of other persons in the preparation of summary  
14 evidence goes to its weight, not its admissibility. *United States v. Soulard*, 730 F.2d  
15 1292, 1299 (9th Cir. 1984); *see Diamond Shamrock Corp. v. Lumbermens Mutual*  
16 *Casualty Co.*, 466 F.2d 722, 727 (7th Cir. 1972) (It’s not necessary... that every person  
17 who assisted in the preparation of the original records of the summaries be brought to the  
18 witness stand”).

#### 19 5. Arguing Penalties.

20 Absent extraordinary statutes requiring the jury to participate in sentencing  
21 determinations, the sole function of the jury is to determine guilt or innocence.  
22 Punishment is within the exclusive province of the Court. *United States v. Del Toro*, 426  
23 F.2d 181, 184 (5th Cir. 1970); *Chapman v. United States*, 443 F.2d 917, 920 (10th Cir.  
24 1971).

25 As such, it is improper for a party to elicit evidence that would allow the jury to  
26 speculate as to the punishment a defendant faces if convicted. *United State v. Feuer*, 403  
27 Fed. Appx. 538, 540 (2d Cir. 2010) (unpublished) (absent exceptional circumstances, a  
28 “defendant has no legal right to introduce evidence or argument regarding sentencing

consequences.”); *United States v. Cook*, 776 F.Supp. 755, 756-57 (S.D.N.Y. 1991) (“The function of the jury in a criminal trial is to determine guilt or innocence based upon an impartial consideration of the evidence, un-swayed by emotion, fear, or prejudice. Where the jury is permitted to speculate concerning a defendant’s possible punishment, a jury cannot properly perform that function.”) (citations omitted); *see also United States v. Pabon-Cruz*, 391 F.3d 86 (2d Cir. 2004).

It is proper for the court to interrupt any arguments relating to punishment or appeals for mercy. *See United States v. Wilson*, 439 F.2d 1081, 1082 (5th Cir. 1971); *Gretter v. United States*, 422 F.2d 315, 319 (10th Cir. 1970). Some cases have held that the court is required to do so. *See United States v. Ramantanin*, 452 F.2d 670, 672 (4th Cir. 1971); *May v. United States*, 175 F.2d 994, 1010 (D.C. Cir. 1949); *see also United States v. Young*, 470 U.S. 1, 13 (1985) (stating that the “better course” would have been for the trial judge to interrupt defense counsel’s improper argument rather than leaving it for the prosecutor to address in rebuttal).

To allow the jury to be swayed by arguments regarding possible punishment would be to permit them to violate their oath not to allow their verdict to be affected by sympathy. *See United States v. Del Toro*, 426 F.2d at 184 (“To inform the jury [concerning] matters relating to the disposition of the defendant, tends to draw the attention of the jury away from their chief function as sole judges of the facts, open the door to compromise verdicts and to confuse the issue or issues to be decided.”) (quoting *Pope v. United States*, 298 F.2d 507 (5th Cir. 1962)).

In short, the defendant should not seek to inflame the prejudices of the jury or conjure up sympathy by referring to the potential sentences and collateral consequences he would face upon conviction.

## VI. RECIPROCAL DISCOVERY

To date, the government has provided over 10,000 pages of discovery to the defense, including documents, law enforcement reports, memoranda, photographs, audio files, video recordings, transcripts, and laboratory material. The United States has not

1 received any reciprocal discovery from the defense and will seek to exclude any offered  
2 during the course of trial that should have been provided previously, pursuant to Rule  
3 16(d)(2) of the Federal Rules of Criminal Procedure.

4 VII. CONCLUSION

5 The United States will supplement this trial brief, if necessary, to address any  
6 additional issues that may be raised.

7 Dated this 25th day of May, 2021.

8 Respectfully submitted,

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